FILE COPY

FILED
OCT 15 1958
JAMES R. BROWNING, Clerk

BRIEF FOR RESPONDENT IN OPPOSITION

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 388

PROGRESSIVE BUILDERS, INC., *Petitioner*,

v.

DISTRICT OF COLUMBIA, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHESTER H. GRAY,
Corporation Counsel, D. C.
MILTON D. KORMAN,
Principal Assistant Corporation Counsel, D. C.
HUBERT B. PAIR,
Assistant Corporation Counsel, D. C.
Attorneys for Respondent,
District Building,
Washington 4, D. C.

PRINTING DIVISION D. C. GOVERNMENT

INDEX

SUBJECT INDEX

	PAGE
Statement of Questions Presented	1
Counter Statement of the Case	2
Argument:	
I. *The decision of the court below is not in conflict with the decision of any other court of appeals or of this Court*	4
II. *No substantial question is presented calling for the exercise of this Court's jurisdiction*	7
Conclusion	10

CASES CITED

United States v. *Blair*, 321 U. S. 730	4, 7-9
United States v. *Cunningham*, 75 U. S. App. D. C. 95, 125 F. 2d 28	4-6, 10
United States v. *Foley Co.*, 329 U. S. 64	4, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 388

PROGRESSIVE BUILDERS, INC., *Petitioner*,

v.

DISTRICT OF COLUMBIA, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT OF QUESTIONS PRESENTED

The contractor, under the standard form of District of Columbia Government contract involved, was charged with liquidated damages when it delayed the completion of the work beyond the contract completion date. Having failed to exhaust the administrative remedies provided for (1)

obtaining extensions of the completion date, and (2) the settlement of disputes arising under the contract.

1. Was not the contractor properly charged with liquidated damages? and

2. Since the matters of which the contractor complained were the subject of disputes arising under the contract, was not the contractor properly denied any recovery of damages?

COUNTER-STATEMENT OF THE CASE

Petitioner, contractor with the District of Columbia for the construction of public works, commenced, in the United States District Court for the District of Columbia, an action for damages and other relief for alleged breach of contract. The complaint alleged three causes of action, but only the first and the second causes of action are here involved (R. 6-17). Petitioner was denied relief. (R. 25-32, 36) and the United States Court of Appeals for the District of Columbia Circuit affirmed (R. 91-96). The contract was for the construction of four open preliminary sedimentation tanks, "Unit 2A," and four sludge digestion tanks, "Unit 4A," Sewage Treatment Plant Extension, Blue Plains, D. C. (R. 25-37).

Pursuant to Article 1 of the contract, written notice to proceed was served upon the petitioner requiring the commencement of the work on May 4, 1949 and its completion within 640 consecutive calendar days thereafter. February 2, 1951 was accordingly the contract completion date. By Article 9 of the contract, provision was made for extensions of time and, in accordance with the procedure therein prescribed, the contract completion date was extended to May 3, 1951. Provision was also made in Article 9 for liquidated damages for each calendar day of delay until the contract work was completed and accepted. By Section 4 of the special stipulations, the amount of liquidated damages was fixed at $100.00 for each calendar day of delay. (R. 41-43.)

Petitioner did not at any time subsequent to May 3, 1951 and prior to March 4, 1952 apply for an extension of time for completion of the contract work (R. 29).

The work was completed and accepted by the District on March 4, 1952, which was 306 calendar days after the contract completion date as extended (R. 25, 44).

On March 5, 1952, the petitioner, in writing, requested an extension until March 5, 1952 of time for the completion of the work. On March 12, 1952 the request was denied (R. 29, 35, 54). At final settlement of the balance due the petitioner, liquidated damages in the amount of $30,600.00 was deducted therefrom (R. 27).

During the performance of the contract work, there were disputes between the petitioner and the District concerning tests of equipment and installations (R. 46, 47, 49, 51, 53). There were also disputes as to whether the filter beds beneath the relief valves were properly installed (R. 45, 49, 50), whether the gas dome tests were possible of accomplishment under the design of the tanks (R. 52, 56), and as to the responsibility of petitioner for the correction of conditions disclosed on inspections (R. 43, 50, 52).

Article 15 of the contract provides that all disputes concerning questions arising under the contract shall be decided by the contracting officer, subject to appeal, within thirty days, by the contractor to the Commissioners of the District of Columbia. It was conceded by the petitioner that it did not pursue the administrative procedure prescribed in Article 15 for the settlement of any such disputes (R. 31, 43).

In the first cause of action, the petitioner demanded $30,600 representing the amount deducted as liquidated damages for 306 calendar days of delay. In the second cause of action, the petitioner demanded $100,282.35 for alleged breach of contract. The trial court found with respect to the first cause of action that the petitioner, having failed to comply with the provisions of Article 9 of the

contract governing extensions of the contract completion date, was not entitled to recover the liquidated damages assessed (R. 29).

In disposing of the second cause of action, the trial court denied any recovery because of the petitioner's failure to pursue the administrative procedure provided by Article 15 of the contract for the settlement of disputes.

ARGUMENT

The petition should be denied because:

I. The decision of the court below is not in conflict with the decision of any other court of appeals or of this Court.

II. No substantial question is presented calling for the exercise of this Court's jurisdiction.

I

The decision of the court below is not in conflict with the decision of any other court of appeals or of this Court.

The court below, in its decision herein, resolved questions of contract law of purely local significance in a manner consistent with the decision of that court in *United States* v. *Cunningham*, 75 U. S. App. D. C. 95, 125 F. 2d 28, and with the decision of this Court in *United States* v. *Blair*, 321 U. S. 730, and *United States* v. *Foley Co.*, 329 U. S. 64.

Involved at the trial was a District Government contract on standard form. Article 9 of the contract entitled "Delays-Damages" prescribed a procedure to govern the parties in the event the petitioner delayed the completion of the contract work, whether such delay was caused by the petitioner, by the respondent, or by other causes. Thus, it was provided that if the delay was caused by the petitioner, the respondent could at its option terminate the contract

and take over the work and hold petitioner and its sureties liable for any loss, or, in the alternative, the respondent could charge petitioner to continue but with liquidated damages for each calendar day of delay. It was provided further that if the delay was attributable to "acts of the Government" or other specified causes, including "unforeseeable causes," the petitioner could obtain extensions of the time for completion without incurring the penalties of contract termination or liquidated damages:

> "* * * if the contractor shall, within ten (10) days from the beginning of any such delay (unless the contracting officer, with the approval of the Commissioners, shall grant a further period of time prior to the date of final settlement of the contract) notify the contracting officer in writing of the causes of delay * * *." (R. 8)

In accordance with the provisions of Article 9 quoted above, the contract completion date was extended from February 2, 1951 to May 3, 1951. It is, however, undisputed in the record that the contract work was not actually completed and accepted by the respondent until March 4, 1952, which was 306 days after the expiration of the completion date as extended (R. 25).

The trial court found as a fact that the petitioner did not at any time during the period beginning March 3, 1951 and ending March 4, 1952 apply for any further extension of the contract completion date (R. 29) and, accordingly, denied the petitioner any recovery of the liquidated damages which had been assessed (R. 27-29).

The court below affirmed on the authority of its decision in *United States* v. *Cunningham*, 75 U. S. App. D. 93, 95, 125 F. 2d 28, *supra*. In that case the question presented was whether oral notice of the causes of delay was sufficient to avoid the penalties of the "Delays-Damages" provision of the Government contract there involved. The court said at page 97:

"This brings us, then, to consider whether oral notice admittedly given by the contractor was the equivalent of a notification 'in writing of the causes of delay'. Obviously, the intent of this provision is to inform the government of the cause of delay and afford an opportunity to remove it as a means of prolonging the stipulated time for completion of the work. * * *

* * *

"The reasoning in these cases seems to be that a provision in a contract of the nature we are discussing is a condition precedent, compliance with which must be shown; and this is true because it must be assumed that the parties in inserting the provision attached both value and importance to its precise terms. In such circumstances, 'The court is not at liberty, either to disregard words used by the parties, descriptive of the subject-matter, or of any material incident, or to insert words which the parties have not made use of.' *Harrison* v. *Fortlage*, 161 U. S. 57, 63, 16 S. Ct. 488, 489, 40 L. Ed. 616. See also *Norrington* v. *Wright*, 115 U. S. 188, 6 S. Ct. 12, 29 L. Ed. 366; *Filley* v. *Pope*, 115 U. S. 213, 6 S. Ct. 19, 29 L. Ed. 372. * * *"

Here, as the record discloses, petitioner made no effort in the direction of compliance with the "Delays-Damages" provisions of Article 9 by giving notice, oral or written, of the causes of delay. Petitioner says, however, that its delay in completing the work was caused by acts of officers of the respondent which were of such a nature as to constitute a breach of contract, and reaons from this that it was relieved from the requirement to give written notice of the causes of delay.

The contractor in *United States* v. *Cunningham*, 75 U. S. App. D. C. 95, 125 F. 2d 28, *supra*, made a similar contention which the court rejected, saying at page 97:

"* * * In *Plumley* v. *United States*, 226 U. S. 545, 33 S. Ct. 139, 57 L. Ed. 342, the contractor had

> agreed, as here, that no delay attributable to the government should be considered, unless the contractor had at the time notified the government 'in writing of the facts and circumstances', and the Supreme Court said that failure to comply with the requirement would defeat the claim of the contractor. * * *".
>
> . . . . . .

Under the circumstances, as pointed out by the court below (R. 94), liquidated damages were properly charged against petitioner.

That the decisions of the United States Court of Claims and of the Federal Administrative Agencies, relied upon by petitioner, do not compel or even permit a contrary conclusion, is so clear as not to require discussion. See *United States v. Foley Co.*, 329 U. S. 64, 68, *supra;* and *United States v. Blair*, 321 U. S. 730, *supra.*

II

No substantial question is presented calling for the exercise of this Court's jurisdiction.

The questions resolved by the court below were of purely local significance in the enforcement of a District of Columbia Government contract for the construction of public works. Petitioner had charged the respondent with breach of contract and had demanded damages measured by the cost of additional labor and materials employed in performing work beyond contract requirements.

Paragraph 2 of the special conditions of the contract, which prescribes the authority of the engineer to decide questions which may arise in connection with the work under the contract, provides in pertinent part as follows:

> ". . . . The contractor shall have the right of appeal in the event of disagreement with the decision of the Engineer. (Article 15, Form of Contract.)" (R. 85)

Article 15 of the contract provides:

> "Article 15. Disputes—Except as otherwise specifically provided in this contract, all disputes concerning questions arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within thirty (30) days to the Commissioners, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed." (R. 39)

The trial court found as a fact that petitioner made no claim against the respondent for breach of contract until the filing of its suit, that petitioner did not proceed in accordance with Article 15 of the contract quoted above, and that no reason was given for the failure of the petitioner to pursue the administrative remedies provided. The trial court then decided, on the authority of *United States* v. *Blair*, 321 U. S. 730, *supra*, that petitioner had not established a right to the relief which it sought (R. 31).

Petitioner contends, however, that its claim for breach of contract was not a claim arising under the contract, but was rather a claim *dehors* the contract and that for this reason it was not required to pursue the administrative remedies provided by Article 15 of the contract quoted above.

This contention is clearly without substance because the inescapable fact is that each of the matters upon which petitioner based its claim for breach of contract was the subject of a dispute between petitioner and officers of respondent which arose during the performance of the contract work. Such disputes were concerned with the performance of various tests of equipment and installations (R. 46, 47, 49, 51, 53), as to whether the filter beds beneath the relief valves were properly constructed (R. 45, 49, 50), whether the gas dome tests were possible of accomplishment under the design of the tanks (R. 52, 56), and as to

the responsibility of the contractor for the correction of conditions disclosed on inspections (R. 43, 50, 52).

The court below said in this connection:

> "In its opinion the trial court said: 'It is conceded that the plaintiff did not proceed in accordance with the requirements of the above quoted Article [Article 15] * * *.'
>
> "We agree with the trial court that a contractor who has not exhausted his administrative remedies is barred by *United States* v. *Blair* from pursuing his cause of action at law. In *Blair* the suit was for damages for extra labor and materials, excess wages, and miscellaneous costs found to be the result of unauthorized acts and grossly erroneous instructions on the part of Government employees. The pertinent provisions of the contract in that case were identical with Article 15 involved here. The Court clearly explained its reasons for denying recovery:
>
> 'In Article 15 the parties clearly set forth an administrative procedure for respondent to follow. Such a procedure provided a complete and reasonable means of correcting the abuses alleged to exist in this case. Arbitrary rulings and actions of subordinate officers are often adjusted most easily and sasitfactor[il]y by their superiors. Furthermore, Article 15 provided the Government with an opportunity to mitigate or avoid damages by correcting errors or excesses of its subordinate officers. Having accepted and agreed to these provisions, respondent was not free to disregard them without due cause, accumulate large damages and then sue for recovery in the Court of Claims. Nor can the Government be so easily deprived of the benefits of the administrative machinery it has created to adjudicate disputes and to avoid large damage claims.' " [Footnote omitted] (R. 94-95)

It is, therefore, too clear for further discussion that the decision of this Court in the *Blair* case, *supra*, is controlling authority in the instant case and that the court below

committed no error when it affirmed the judgment of the trial court. See, also, in this connection, *United States* v. *Cunningham*, 75 U. S. App. D. C. 95, 125 F. 2d 28, *supra*, which is also applicable because of the nature of the claims and the similarity of the contract provisions involved.

From the foregoing it appears without any serious question that petitioner has presented nothing of sufficient substance to warrant the exercise of this Court's jurisdiction to review on certiorari.

CONCLUSION

The respondent respectfully submits that the petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be denied.

Respectfully submitted,

CHESTER H. GRAY,
Corporation Counsel, D. C.
MILTON D. KORMAN,
Principal Assistant Corporation Counsel, D. C.
HUBERT B. PAIR,
Assistant Corporation Counsel, D. C.
Attorneys for Respondent,
District Building,
Washington 4, D. C.